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Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

DEMETRIUS GREEN,

Petitioner

V.

STATE OF CONNECTICUT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO

THE SUPREME COURT OF THE

STATE OF CONNECTICUT

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November 19, 1984

23 pp

QUESTIONS PRESENTED

1. Whether the State of Connecticut was relieved of its obligation of proving each and every element of the crime charged beyond a reasonable doubt, thereby denying the petitioner due process of law.

2. Whether the standard of review employed by the Supreme Court of Connecticut conflicts with the standards mandated by the decision of this Court in Jackson v. Virginia, 443 U.S. 307 (1979).

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The petitioner, DEMETRIUS GREEN, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Connecticut entered in this proceeding on August 14, 1984.

OPINION BELOW

The opinion of the Supreme Court of the State of Connecticut is reported at 194 Conn. 258 (1984) and appears in the Appendix hereto.

JURISDICTION

The opinion of the Supreme Court of the State of Connecticut was entered on August 14, 1984. A timely motion to reargue was denied on September 26, 1984, by that court, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the State of Connecticut was relieved of its obligation of proving each and every element of the crime charged beyond a reasonable doubt, thereby

denying the petitioner due process of law.

2. Whether the standard of review employed by the Supreme Court of Connecticut conflicts with the standards mandated by the decision of this Court in Jackson v. Virginia, 443 U.S. 307 (1979).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XIV

Section 1. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTORY PROVISIONS INVOLVED

CONNECTICUT GENERAL STATUTE, SEC. 53a-65, in pertinent part:

Definitions. As used in this part,

except section 52a-70b, the following terms have the following meanings:

(1) "Actor" means a person accused of sexual assault.

(2) "Sexual intercourse" means vaginal intercourse, anal intercourse, fellatio or cunnilingus between person regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emmission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body. Its meaning is limited to persons not married to each other.

(3) "Sexual contact" means any contact with the intimate parts of a person not married to the actor for the purpose of

sexual gratification of the actor.

(4) "Use of force" means: (a) Use of a dangerous instrument; or (b) use of actual physical force or violence or superior physical strength against the victim.

(8) "Intimate parts" means the genital area, groin, anus, inner thighs, buttocks or breasts.

CONNECTICUT GENERAL STATUTE, SEC. 53a.-70a, in pertinent part: Sexual Assault in the First Degree: Class B felony (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably causes such

person to fear physical injury to such person or a third person.

CONNECTICUT GENERAL STATUTE

SEC. 53a-72a, in pertinent part: Sexual Assault in the Third Degree: Class D felony. (a) A person is guilty of sexual assault in the third degree when such person (1) compels another person to submit to sexual contact (A) by the use of force against such other person or a third person, or (B) by the threat of use of force against such other person or against a third person, which reasonably causes such person to fear physical injury to such person or a third person.

CONNECTICUT GENERAL STATUTE

SEC. 53a-49(a), in pertinent part: Criminal Attempt: Sufficiency of conduct; renunciation as defense. (a) A person is

guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative of the

actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession collection or fabrication of materials to be employed in the commission

of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances, (7) soliciting an innocent agent to engage in conduct constituting an element of the crime.

STATEMENT OF THE CASE

Demetrius Green, the petitioner here, was convicted in the Connecticut Superior Court of attempted sexual assault in the first degree in violation of Connecticut General Statues §§53a-70(a) and 53a-49(a). The Connecticut Supreme Court affirmed the conviction.

That court ruled that a jury could have reasonably found sufficient facts to support a conviction for attempting to

forcibly compel another to engage in sexual intercourse based upon the following scenario:

Jacqueline McCauley, a sixteen year old student, claimed that on September 23, 1979, at about 7:30 p.m. a black male, armed with a gun, approached her near a park in New Haven and ordered her to "[t]urn the other way" and to go into some bushes behind a park fence; he told her "to lay down and take [her] clothes off." [Tr. pp. 11-12] She avoided doing this by various artifices and excuses; she fumbled with her pants, but did not in fact "undo them." [Tr. pp 13] She claimed that the man "knelt down . . . on the ground, started to "loosen his pants [and] started to undo his button." [Tr. pp. 13-14] When she started to scream, the man struck her

and told her that "[she] was dead." While the man was trying the force her pants off, the zipper on her pants broke. Without further activity the man suddenly said, "Get up. Get out of here." [Tr. p. 15]

The petitioner argued to the Connecticut Supreme Court, inter alia, that the State had failed to sustain its burden of proof and had not proved each essential element of the crime beyond a reasonable doubt. The petitioner argued that the State had been unconstitutionally relieved of its burden of proving an essential element of attempted rape -- attempted penetration. He further argued that the State had proved facts sufficient to support only a conviction of the lesser included offense of attempted sexual contact in violation of Connecticut General

Statute §53a-65 (3).

The Connecticut Supreme Court held that the conduct described above constituted a "substantial step" toward commission of the crime, and thus found that the State had sustained its burden of proving attempted rape.

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE CONNECTICUT SUPREME COURT OF THE STATE OF CONNECTICUT IS IN CONFLICT WITH JACKSON V. VIRGINIA, 443 U.S. 307.

It is, of course, well established that the Due Process clause of the Fourteenth Amendment safeguards against dilution of the fundamental principle of our jurisprudence that guilt is to be established only by probative evidence and beyond a reasonable doubt. In re Winship,

397 U.S. 358 (1970). This Court has, for more than a decade, held fast to the Winship principle that the prosecution bears the burden of proving each and every element of the crime charged beyond a reasonable doubt. Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 1977); Sandstrom v. Montan, 442 U.S. 510 (1979); Connecticut v. Johnson, 460 U.S. ; 103 S. Ct. 969 (1983)

In Jackson v. Virginia, 443 U.S. 307, 315 (1979), this Court ruled, inter alia, that the reasonable doubt standard as enunciated in Winship requires the factfinder to "reach a state of near certitude of the guilt of the accused ..." While Jackson v. Virginia, clarified the role of the federal appellate courts for purposes of habeas corpus review of

sufficiency of evidence claims, this Court has not, for almost twenty-five, years, since Thompson v. Louisville, 362 U.S. 199 (1970), given any clear direction to State trial and appellate courts regarding the quantum of evidence necessary to satisfy the rigid requirements of Winship.

The case at bar presents an opportunity to assess the quantum of evidence necessary to satisfy the prosecutorial burden under Winship when an attempt crime is charged. As Justice Stewart argued in his dissent from denial of certiorari in Freeman v. Zahradnick, 429 U.S. 1111 (1977), the "no evidence rule" of Thompson should be reassessed in light of the requirements of Winship. Certainly, in light of this Court's reaffirmance of the burden of proof requirements in Mullaney and Sandstrom, the

need to clarify the standard for attempt crimes is even more pressing.

While Jackson v. Virginia held that the Due Process Clause forbids any conviction based on evidence insufficient to persuade a rational factfinder of guilt beyond a reasonable doubt, Tibbs v. Florida, 457 U.S. 31 (1982) the case at bar demonstrates, all too painfully, the minute quantum of evidence found to be sufficient to prove guilt beyond a reasonable doubt in attempt crimes.

Mr. Green was convicted of attempted sexual assault in the first degree in violation of Connecticut General Statute §§53a-70. The only type of sexual activity prohibited by this statue is sexual intercourse, as that term is defined by Connecticut General Statute §53a-65(2).

These statutes define sexual intercourse as "vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete . . . intercourse . . . . Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim's body." The Connecticut Supreme Court held that despite the fact that the State had presented no direct, indirect, or circumstantial evidence, of any kind whatsoever, to establish that the attempted crime involved sexual intercourse, or that penetration was in any way attempted, the petitioner could lawfully be convicted of attempted sexual assault.

The record in the case at bar, even

when viewed in the light most favorable to the prosecution, as required under Jackson v. Virginia, is absolutely devoid of any evidence capable of proving, beyond a reasonable doubt, that penetration was attempted or even contemplated.

Furthermore, the standard employed by the Connecticut Supreme Court, i.e. that in reviewing a claim challenging the sufficiency of the evidence, the evidence must be given a construction most favorable to sustaining the verdict reached by the jury, is in sharp conflict with the standard for appellate review enunciated by this court in Jackson v. Virginia. The Connecticut standard does violence to the Due Process Clause requirement that the evidence must be sufficient to persuade a rational trier of fact beyond a reasonable doubt.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Connecticut.

Respectfully submitted:

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APPENDIX A
CONNECTICUT SUPREME COURT DECISION

STATE OF CONNECTICUT
v.
DEMETRIUS GREEN
(11147)

PETERS, HEALEY, SHEA, GRILLO
and BIELUCH, Js.

Convicted of the crime of attempted sexual assault in the first degree, the defendant appealed. He claimed, inter alia, that the state "suppressed" a photograph which the victim had, on the night of the incident, identified as that of a person who "looked like" her assailant and that that "suppression" precluded his using the photograph to impeach the victim's credibility. Held:
1. This court could not conclude that the defendant was treated unfairly by the fact that the state "suppressed" the photograph, he having failed to show that

"the omitted evidence creates a reasonable doubt [as to his guilt] that did not otherwise exist."

2. There was no merit to the defendant's claim that the trial court erred in admitting into evidence, in violation of his constitutional right to remain silent, the testimony of a police officer to the effect that he had refused to make a written statement after he had been given his Miranda warnings.

3. The defendant's claim that the state failed to prove beyond a reasonable doubt that he was guilty of the crime charges was unavailing.

Argued May 3--decision released August 14, 1984.

Information charging the defendant

with the crime of attempted sexual assault in the first degree, brought to the Superior Court in the judicial district of New Haven and tried to the jury before Reynolds, J.; verdict and judgment of guilty, and appeal by the defendant to this court. No error.

John R. Williams, for the appellant (defendant).

Julia D. Dewewy, assistant state's attorney, with whom, on the brief, were Arnold Markle, state's attorney, and Patrick J. Clifford, assistant state's attorney, for the appellee (state).

ARTHUR H. HEALEY, J. THe defendant, Demetrius Green, was convicted after a

trial to a jury of attempted sexual assault in the first degree in violation of General Statutes §§53a-70 (a)[1] and 53a-49 (a). On this appeal, he claims: (1) that the trial court erred in the admission, on the state's case-in-chief, of the defendant's refusal to give the police a written statement which refusal occurred after the defendant was given Miranda warnings; (2) that the state "suppressed" a police photo which the victim had told the police resembled the perpetrator of the crime charged; and (3)

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[1] General Statutes § 53a-70 (a) A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person or a third person, or by the threat of use of force against such other person or against a third person which reasonably

that the state did not prove him guilty beyond a reasonable doubt of the crime charged.

The jury could reasonably have found the following: At about 7:30 p.m. on September 23, 1979, the defendant, wielding a handgun, attempted to attack a sixteen-year-old girl in New Haven. The victim was walking from the house of her girlfriend on Washington Avenue to her home on Kimberly Avenue which was nearby. While walking easterly in the dark along the Boulevard near Lamberton Street, the victim saw the defendant walking westerly on the Boulevard coming over a bridge. He crossed the street and walked towards her.

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causes such person to fear physical injury to such person or third person."

The defendant came up to her and said, "[t]urn around and go the other way." She saw that he had a gun and she did as he ordered. Directing her to go into the bushes by a park fence which was on the Boulevard, he told the victim "to lay down and take off[her]clothes." She got on the ground, fumbled with her "pants area" as if she were going to take her pants off but she did not in fact "undo them." While she was lying on her side, the defendant "knelt down on the ground too." The victim was crying, making excuses, telling him she was thirteen years old, that he stomach hurt, and that her brother was coming to meet her "over the bridge." When he first told her to take her clothing off, he put his gun away in his

belt, and he began to take his clothing off by starting "to loosen his pants [and] [h]e started to undo his button." She screamed and attempted to get away, but he held her down and hit her on the side of her head with his hand. During this time, he "kept telling [her] to take off [her] clothes." After she made her excuses, "he tried to take [her] pants off" and "he put [the gun] to [her] head" and said that she "was dead." While he was trying to force her pants off, the zipper on her pants broke. He then told her, "Get up. Get out of here." This entire incident lasted about fifteen minutes.

The victim then got up and returned to her girlfriend's house on Washington Avenue. When she reached the front of that

house, the defendant was on that street. He turned around and pointed his gun at her, whereupon she started screaming and he fled. The police were called to the girlfriend's house and the victim's mother also went there.

Shortly thereafter, a police officer took the victim and her mother to police headquarters where a statement was taken from the victim by Detective Nicholas Franco after she had gone through five or six trays of police photos without making a positive identification of her assailant. At the trial, the victim said she had told Franco that one photo "looked like [her assailant]"[2] but that she did

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[2] She also said at the trial that she picked out that photo "because it looked a

not tell Franco that "it was him." Franco testified at the trial that the victim termed the photo "as a possible look alike." At police headquarters that night, Franco made a note of the date of that photo and its number. This photo was not produced before or during the trial.

The victim also gave Franco a description of her assailant while at police headquarters and Franco caused it to be broadcast on the police radio. At about ten o'clock that night, while Franco was driving the victim and her mother home, he received a broadcast from another

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little like him," but that it was not the person who attacked her.

[3] The police officer who had stopped the defendant in the vicinity of Congress Avenue and Arch Street, in doing so, told him that "he matched a description of a subject wanted for sexual assault."

police officer that he had stopped a person who fitted the description of the victim's assailant.[3] Franco then drove to Congress Avenue and Arch Street where the defendant was with at least two police officers. The victim "positively identified" him as the perpetrator, both from a distance and when the officers brought him over to the police car, at which time she also heard his voice when he asked here whether she was "sure" that he was her assailant.

Leaving the scene, Franco took the victim and her mother home and then he returned to police headquarters. At police headquarters Franco spoke to the defendant. He advised the defendant of his Miranda rights and then asked him if

he wanted to give a formal statement. Franco testified on direct examination during the state's case-in-chief that the defendant said that "he didn't want to give a statement, but it wasn't him and that he was at his mother's house till about 7:30 that night.

I

We take up first defendant's claim that the state "suppressed" a police photo which the victim stated "looked like" the defendant. The defendant claims that this suppression denied him his fourteenth amendment due process rights. In doing so, he refers to the circumstances that his conviction was based on an out-of-court identification which the court considered "unnecessarily

suggestive,"[4] that he was not wearing the trousers described by the victim when he was arrested, and that he did not have the weapon she had described. He therefore argues that the "suppression" of this photo precluded his use of it to impeach the credibility of the victim.

With regard to the photo in question, Franco testified on cross-examination that he did not set this photo aside because it

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[4] Prior to the start of the trial, the court held a hearing on the defendant's motion to suppress the victim's out-of-court identification of the defendant made when Franco took her to Congress Avenue and Arch Street.

In announcing its decision denying that motion, the court said that while "[the defendant] was not handcuffed, he was in the presence of police officers. That could be construed to be unnecessarily suggestive. But, certainly other factors outweigh any suggestiveness. I think she's made a credible withness." It is clear that the trial court found that her

was department practice not to do so unless the viewer made a positive identification. Franco also testified on cross-examination that he had not made any attempt to look for this photo "within the last week or two." During the trial, the state said that it had informed defense counsel "before this case started" that the photo was unavailable, that it had made an attempt to find the photo, but it could not be located.[5]

In Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court said that "suppression by the prosecution of

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identification was reliable. This finding has not been challenged on appeal.

[5] An examination of the record before us does not disclose any pretrial motion for exculpatory evidence by the defendant.

evidence favorable to an accused...violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." See Moore v. Illinois, 408 U.S. 786, 92 S. Ct. 2562, 33 L. Ed. 2d 706, reh. denied, 409 U.S. 897, 93 S. Ct. 87, 34 L. Ed. 2d 155 (1972). The United States Supreme Court delineated the parameters in Mooew c. Illinois, supra. In Moore, the court said that "[t]he heart of the holding in Brady is the prosecution's suppression of evidence, in the face of a defense production request, where the evidence is favorable to the accused and is material either to guilt or to punishment. Important, then, are (a) suppression by the prosecution after a

request by the defense, (b) the evidence's favorable character for the defense, and (c) the materiality of th evidence." Moore v. Illinois, supra, 794-95. To prevail on a claimed violation of Brady and its progeny, a defendant must establish each of these three prongs. See Moore v. Illinois, supra, 794-95; State v. Doolittle, 189 Conn. 183, 197, 455 A.2d 843 (1983); People v. Hedrick, 192 Colo. 37, 40-41, 557 P.2d 378 (1976).

In United States v. Agurs, 427 U.S. 97, 108, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), the court further elaborated on the materiality prong, stating that the prosecutor does not violate his constitutional duty of disclosure "unless his omission is of sufficient significance

to result in the denial of the defendant's right to a fair trial." In illuminating the proper standard of materiality that must be shown, the Agurs court said that "if the omitted evidence creates a reasonable doubt [of guilt] that did not otherwise exist, constitutional error had been committed." United States v. Agurs, supra, 112. Pointing out that this meant that "the omission must be evaluated in the context of the entire record," it went on to note that "[i]f there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial, [but] on the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor

importance might be sufficient to create a reasonable doubt." United States v. Agurs, supra, 112-13. That court, however, also said that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of he trial, does not establish 'materiality' in the constitutional sense." United States v. Agurs, supra, 109-10; see State v. Doolittle, supra, 197.

Our analysis will proceed on the assumption that the failure of the police to preserve the photo was a supression." [6]

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[6]There is no claim that the state deliberately or in bad faith suppressed the photo involved. Only an intentional or deliberate suppression of evidence is a per se violation of due process sufficient to reverse or nullify a conviction. See

United States v. Keogh, 391 F.2d 138 (2nd Cir. 1968). There is no doubt of the "constitutional obligation of a prosecutor to disclose all material evidence favorable to an accused in his possession, an obligation that exists without statutory or practice book mandates." State v. Packard, 184 Conn. 258, 277, 439 A.2d 983 (1981); United States v. Agurs, 427 U.S. 97, 107, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963); see General Statutes §54-86c; Practice Book §§741, 747.

General Statutes ¶ 54-86c requires the state to disclose, "[n]ot later than thirty days" after a defendant pleads not guilty, "any exculpatory information or material... whether or not a request has been made ...." Because there is not any evidence that shows when the state's attorney first became aware of the photo, and no evidence that he ever in fact had it, we perceive no per se violation of this statute under the circumstances of this case. It is difficult conceptually to consider the "loss" of this evidence as due to the negligence of the state. In any event, where evidence is inadvertently lost or otherwise unavailable, the fact that a defendant has been denied access to evidence that may be only "arguably favorable" does not mean that his due process rights have been violated. See Talamante v. Romero, 620 F.2d 784, 788 (10th Cir.), cert. denied, 449 U.S. 877, 101 S. Ct. 223, 66 L. Ed. 2d 99 (1980).

Under the Brady line of decisions, the evidence suppressed must not only be favorable to the defendant, but also material to either his guilt or punishment. Moore v. Illinois, supra, 794-95. Evidence is material if it "could ... in any reasonable likelihood have affected the judgment of the jury." Napue v. Illinois, 360 U.S. 264, 271, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). The defendant must show that the evidence was material and of some substantial use to him. United States v. Tomaiolo, 378 F.2d 26 (2nd Cir.), cert. denied, 389 U.S.886, 88 S. Ct. 159, 19 L. Ed. 2d 184 denied, 389 U.S. 886, 88 S. Ct. 159, 19 L. Ed. 2d 184 (1967); see Talavera v. State, 227 So. 2d 493, 497 (Fla. App. 1969); Strange v.

State, Ind., 452 N.E. 2d. 927, 929 (1983). Favorable evidence is that "evidence which... might have led the jury to entertain a reasonable doubt about... guilt"; Levin v. Katzenbach, 124 U.S. App. D.C. 158, 162, 363 F.2d 287, 291 (1966); see United States v. Bryant, 142 U.S. App. D.C. 132, 138, 439 F.2d 642, 648 (1971); and this doubt must be one "that did not otherwise exist." United States v. Agurs, supra, 112, Talamante v. Romero, 620 F. 2d 784, 789 (10th Cir.), cert. denied, 449 U.S. 877, 101 S. Ct. 223, 66 L. Ed. 2d 99 (1980).

The level of materiality that need be proven here to establish a Brady violation is such that "the omitted evidence creates a reasonable doubt [as to guilt] that did

not otherwise exist... [and] the omission must be evaluated in the context of the entire record." United States v. Agurs, supra, 112; State v. Packard, 184 Conn. 258, 279, 439 A. 2d 983 (1981). In this case we deem that level to be appropriate in view of the apparent unintentional or, at most, the inadvertent "suppression" of the missing photo.

Initially, it seems evident that the missing photo would have had some materiality inasmuch as it might have affected the credibility of the complaining witness. The rule laid out in Brady requiring disclosure of exculpatory evidence applies to materials that "might well alter the jury's judgment of the credibility of a crucial prosecution

witness." United States v. Higgs, 713 F.2d 39, 42 (3d Cir. 1983); see Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). We conclude that the materiality of this photo falls short of the level of materiality demanded by Agurs. As Justice Marshall recently said, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." California v. Trombetta, U.S., (52 U.S.L.W. 4744, 4747, June 11, 1984). The defendant had ample opportunity to cross-examine the victim fully and question her reliability before the jury at trial upon the identity of her

alleged assailant. He did this after an earlier cross-examination of the victim during the suppression hearing concerning her identification of him. The defendant has not challenged the victim's physical description of him. Despite the victim's fairly comprehensive description of the defendant, the only attack on her identification of him related to her statement that he wore maroon trousers. It is apparent from the evidence that the defendant was wearing brown trousers when apprehended by the police about two hours after the alleged incident.[7]

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[7] The trousers taken from the defendant were marked as an exhibit at the trial. When she was shown these at the trial, she said they were brown. No issue has been raised as to the shirt and sweater of the assailant which were also exhibits.

The defendant argues that the missing photo was crucial because the state's case was weak and essentially consisted of the victim's testimony. Indeed, it is common knowledge that such offenses are seldom undertaken in public view or in the presence of witnesses. State v. Gionfriddo, 154 Conn. 90, 96, 221 A.2d 851 (1966); State v. Coulombe, 143 Conn. 604, 608, 124 A.2d 518 (1956); State v. Chuchelow, 131 Conn. 82, 83, 37 A.2d 689 (1944). The credibility of the complaining witness may be critical in many of these cases; sometimes it may be the only evidence of the commission of the crime. We, therefore, have said that a broad latitude should be allowed to test the veracity of such a witness. See,

e.g., State v. Gionfriddo, supra; 81 Am. Jur. 2d, Witnesses §492. An assertion that a case is weak does not require an appellate court to upset a verdict of guilty if the evidence affords the trier of the fact a proper basis for its verdict.

We are aware that the requirements of Brady and its progeny are imposed because "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly." Brady v. Maryland, supra, 87. On balance, we cannot conclude that the defendant was treated unfairly, particularly because he has not shown that "the omitted evidence creates a reasonable

doubt that did not otherwise exist." United States v. Agurs, supra, 112; see State v. Doolittle, supra, 197.

II

We take up next the defendant's claim that the state's introduction of evidence in its case-in-chief of the defendant's refusal to give a written statement after having been arrested and given his Miranda rights was plain error and a violation of his federal and state constitutional rights.[8] We do not agree.

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[8]Although this evidence came in at the trial without objection or exception, we will review it under the second "exceptional circumstance" of State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973), where the record adequately supports the claim that a litigant has been clearly deprived of a fundamental constitutional right and a fair trial.

On the state's case-in-chief, Franco testified that after the defendant had been arrested, processed at police headquarters and given his Miranda rights for the second time that night, he asked the defendant if he wanted to give a written statement. The defendant refused.[9] At the trial, the defendant's

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[9] The transcript discloses that at that time the following took place:

"A.... I went down and brought him upstairs, asked him if he wanted to give a formal statement.

"Q. Did you advise him of his Miranda Rights before you did this?

"A. Yes, I did.

"Q. What did he say to you?

"A. He told me he didn't want to give a statement, but it wasn't him and that he was at his mother's house till about 7:30 that night.

"Q. Is that what he told you?

"A. That's what he told me.

"Q. And, he would not reduce that to writing in any way?

"A. No.

mother testified that Franco had called her sometime after 7:30 p.m. on the night in question and that she had told him that the defendant had left her house on Lilac Street after 7:30 p.m.[10]

"Q. Did you have occasion sometime after your conversation with the defendant to call up his mother?

"A. Yes, I did.

"Q. What did she say?

"A. As near as I can recall, I asked if her son was at her house at all. And, she told me that he was, and that he left when it was getting dark about 7:30 or 8 o'clock.

"Q. When you called her up, I assume, you told her when you were, that you were a detective?

"A. I identified my self.

"Q. She said he left when it was getting dark around 7:30 or so?

"A. Yes.

"Mr. Clifford: I have nothing further."

[10] Cross-examination of Franco disclosed that the defendant had told Franco that he lived with his mother on Lilac Street in New Haven which was on "the other side of town from where the incident occurred."

The defendant cites Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), to support his claimed violation of Miranda rights.[11] Doyle held that a defendant's postarrest silence following receipt of Miranda warnings may not be used for impeachment purposes during cross-examination. Doyle v. Ohio, supra; see State v. Nowakowski, 188 Conn. 620, 622, 452 A.2d 938 (1982). That decision was based on due process grounds and

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[11] The defendant also argues that the state's conduct here violated article first, § 8 of the Connecticut Constitution. He relies on State v.Ferrone, 97 Conn. 258, 116A. 336 (1922), and State v. Bates, 140 Conn. 326, 99 A.2d 133 (1953). We reject this claim based on the same analysis we set forth in rejecting his claim based on Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

concluded that it would be fundamentally unfair to advise a defendant of his right to remain silent and then to use the fact of silence against him. Doyle v. Ohio, supra, 618. The defendant argues that the state, in eliciting this evidence of his alibi defense, did so to show that he would not make a written statement about it and to undermine seriously his alibi, thereby violating his constitutional rights. We do not agree.

In making this claim, the defendant's position is anomalous. He does not object to the testimony of Franco that he orally denied that he was the assailant and that he had an alibi, but he does object to the testimony that he refused to put his oral statement in writing. It is true that the

defendant was asked if he wanted to make a written statement. But rather than simply saying that he did not, he gave an unsolicited response. The defendant does not object to the portion of his response which is beneficial to his defense; he does object, however, to that portion which he claims is not beneficial. His answer to Franco above and beyond his declaration that he would not give a written statement was an unsolicited response. He makes no claim about the voluntariness of his response. The defendant makes no claim that the police interrogated him after he invoked his Miranda rights. See Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

While the circumstances of this case disclose that there was no impeachment of the defendant personally as a witness, we, nevertheless, deem the Doyle analysis helpful because of the alleged "impeachment" of the defendant by the state on its case-in-chief. See Chapman v. United States, 547 F.2d 1240, 1248 (5th Cir.), cert. denied, 431 U.S. 908, 97 S. Ct. 1705m 52 L. Ed. 2d 393 (1977). Doyle pointed out that "every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Doyle v. Ohio, supra, 617. Moreover, that court opined that the implicit assurance given by the Miranda warnings that silence will not be penalized would render it "fundamentally

unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (Emphasis added.) Doyle v. Ohio, supra, 618. In this case, unlike Doyle, the defendant's "silence" was not used by the state. Indeed, the defendant's claim that his silence was protected by Doyle was not "Doyle silence" at all because, having been advised of his Miranda rights, he decided not to stay silent but voluntarily chose to declare he was not the perpetrator and that he had an alibi. He chose to do this despite his initial response that he would not give a written statement. Franco's direct testimony, therefore, hardly brought forth any

inference of an alibi fabricated "somewhere along the way" well after arrest and before trial to offset such an exculpatory position at trial as in Doyle. See State v. Zeko, 177 Conn. 545, 418 A.2d 917 (1979). If anything, it had quite the contrary effect. The state not only brought out Franco's call to the defendant's mother the very night of his arrest, but the testimony of the defendant's mother completely corroborated the defendant's alibi; this is hardly an undermining of his alibi claim. It is clear that this claimed violation of Doyle is without merit. Due process in general, and explicitly in Doyle, is concerned with fundamental fairness, and we find no deprivation of that here.

III

Finally, the defendant argues that the state failed to prove beyond a reasonable doubt that he was guilty of the crime charged. He claims that the state did not present any direct or indirect evidence of any kind to establish that the crime attempted involved sexual intercourse as defined by General Statutes §53a-65(2). It is also claimed that if the intent of the perpetrator as described by the victim "was to have sexual contact," the crime would have been attempted sexual assault in the third degree, i.e., General Statutes § 53a-72a, rather than the crime of which he was convicted. Further, he maintains that there was no evidence from which he could have been convicted. This

requires, the defendant concludes, the reversal of his conviction with direction to enter a judgment of not guilty. We do not agree.

Under General Statutes §53a-49(a), "[a] person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." (Emphasis added.)

Essentially, an attempt under §53z-49(a) is an act or omission done with the intent to commit some other crime. The rationale is that while a defendant may have failed in his purpose, his conduct is, however, criminally culpable, and if carried far enough along causes a sufficient risk of harm to be treated as a crime in an of itself. See, e.g., Hall "Criminal Attempt--A Study of Foundations of Criminal Liability," 49 Yale L.J. 789 (1940). The act or acts must be something more than mere preparation for committing the intended crime; they must be at least the start of a line of conduct which will lead naturally to the commission of a crime which appears to the actor at least to be possible of commission by the means

adopted. State v. Mazzadra, 141 Conn. 731, 736, 109 A.2d 873 (1954).

In this case, the trial court charged the jury on the alternative bases of attempt contained in subsections (1) and (2) of §53a-49(a), both of which require proof of the element of intent.[12] Under

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[12] General Statues § 53a-49 provides in part: "(a) A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

"(b) Conduct shall not be held to constitute a substantial step under subdivision (2) of subsection (a) unless it is strongly corroborative of the actor's criminal purpose. Without negating the sufficiency of other conduct, the following, if strongly corroborative

our penal code "[a] person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct." General Statutes §53a-3(11). The state must prove that the defendant acted with the specific intent to commit sexual assault in the first degree which in turn included the intent

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of the actor's criminal purpose, shall not be held insufficient as a matter of law: (1) Lying in wait, searching for or following the contemplated victim of the crime; (2) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission; (3) reconnoitering the place contemplated for the commission of the crime; (4) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed; (5) possession of materials to be employed in the commission of the crime, which are specially designed for

to commit sexual assault in the first degree which in turn included the intent to have sexual intercourse.[13] "It is not

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such unlawful use or which can serve no lawful purpose of the actor under the circumstances; (6) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances; (7) soliciting an innocent agent to engage in conduct constituting an element of the crime."

The court's instructions to the jury have not been challenged on appeal and are, therefore, assumed to be be adequate and legally correct. Vogel v. Sylvester, 148 Conn. 666, 668, 174 A.2d 122 (1961).

[13] See footnote, 1 supra.

General Statutes §53a-65(2) provides that:"'Sexual intercourse' means vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse of fellatio and does not require emmission of semen. Penetration may be committed by an object

enough [just] to show that the defendant intended to do some unspecified criminal act." LaFave & Scott, Criminal Law §59,p.429. Also, it must be proven that a defendant conducted himself to carry out that intent. "Since a determination of the defendant's intent involves an examination of his mental state...it necessarily must be proved by his statements or acitons." (Citations omitted.) State v. Holley, 174 Conn. 22, 25-26, 381 A.2d 539 (1977). This is one way of saying that a person's intention is be inferred from his conduct and the surrounding circumstances. "Where there

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manipulated by the actor into the genital or anal opening of the victim's body. Its meaning is limited to persons not married to each other."

is sufficient evidence to suppor a reasonable inference that the defendant intended to commit the crime charged, whether such an inference should be drawn is properly a question for the jury to decide." State v. Morrill, 193 Conn. 602, 609, A.2d (1984).

The question thus becomes whether the jury, considering the defendant's conduct and all the surrounding circumstances, could conclude that there was no reasonable doubt that the defendant acted with the intent to commit sexual assault in the first degree. See State v. Tucker, 181 Conn. 406, 417, 435 A.2d 986 (1980). The state must prove every essential element of the crime beyond a reasonable doubt and, while the jury may

draw reasonable and logical inferences, it may not resort to speculation. State v. Tucker, supra; State v. Saracino, 178 Conn. 416, 419, 423 A.2d 102 (1979). In reviewing a claim challenging the sufficiency of the evidence, the evidence must be given a construction most favorable to sustaining the verdict reached by the jury. State v. Tucker, supra, 418; State v. Jackson, 176 Conn. 257, 262, 407 A.2d 948 (1978).

"A person is guilty of sexual assault in the first degree when such person compels another person to engage in sexual intercourse by the use of force against such other person...or by the threat of use of force against such other

person...which reasonably causes such person to fear physical injury to such person...." General Statues §53a-70(a). A specific intent to commit sexual assault in the first degree is an essential element of that crime and on the evidence the jury could find that proven.

In this case, the defendant, brandishing a handgun, approached a young girl, sixteen years of age, on a street after dark and told her to turn around and go the other way. He forced her to go into some bushes behind a park fence. He ordered her to lie on the ground and take off her clothes, and despite her excuses and crying, she acted as if to do so. He put his gun in his belt, knelt on the ground, started to "loosen his pants [and]

started to undo his button." When she tried to get away, he held her down and struck her. During all this time, the defendant repeatedly told her to take off her clothes. The defendant attempted to take off her pants and put the gun to her head and told her that "[she] was dead." It is true that he did not say anything to her of his intent, but that is not necessary to establish proof of intent. See, e.g., State v. LaVine, 68 Wash. 2d 83, 411 P.2d 436 (1966). Under all the circumstances, the jury was justified in finding that the defendant had the specific intent to commit the crime of sexual assault in the first degree. They could reasonably have found that he acted "intentionally" as that is defined in

General Statutes §53a-3(11).

After finding that the defendant acted with the necessary mental state required, the remaining question is whether the jury could reasonably have found out he evidence that the defendant's conduct was of the nature to constitute the inchoate crime of attempt as charged. Once the mental state required under the attempt statute in §53a-49(a) is found, there are two subsections of that statute under which a defendant may be found guilty. Under the evidence, the jury could have found this defendant guilty under both, although one would have been sufficient. The law recognizes, as it must, that the method of committing or attempting to commit a crime varies with the particular

crime involved; some crimes may be attempted or executed with greater instantaneity that others. See People v. Rizzo, 246 N.Y. 334, 337-38, 158 N.E. 888 (1927). As Justice Holmes once said: "[P]reparation is not an attempt. But some preparations may amount to an attempt. It is a question of degree. If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a [crime] although there is still a locus penitentiae in the need of a further exertion of the will to complete the crime." (Emphasis in original.) Commonwealth v. Peaslee, 177 Mass. 267, 272,59 N.E. 55 (1901); see United States v. Coplon, 185 F.2d 629, 633

(2d Cir. 1950)(L. Hand, J.). We have said that "the attempt is complete and punishable, when an act is done with intent to commit the crime, which is adapted to the perpetration of it, whether the purpose fails by reason of interruption...or for other extrinsic cause.' State v. Wilson, 30 Conn. 500, 506 [1862]; State v. Enanno, 96 Conn. 420, 427, 114 A. 386 [1921]." State v. Mazzadra, supra. In Mazzadra, a snoted earlier, we also said that "[t]he acts done must be at least the start of a line of conduct which will lead naturally to the commission of a crime which appears to the [defendant] at least to be possible of commission by the means adopted." State v. Mazzadra, supra, citing 1 Wharton,

Criminal Law (12th Ed.)§ 221. Each case depends upon its own factual pattern. State v. Mazzadra, supra.

Under §53a-49(a)(1), a defendant acting with the required mental state is guilty of the crime of attempt where he "[i]ntentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be..." On the evidence, the jury could reasonably have found that his intentional conduct, which was beyond mere preparation, was to perform acts and accomplish a result that would constitute the crime charged inasmuch as the circumstances for doing so were, in his belief, accommodating to his criminal purpose. Moreover, under §53a-49(a)(2), a

defendant with the required mental state is guilty of the crime of attempt when he "intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime." To constitute a "substantial step," the conduct must be "strongly corroborative of the actor's criminal purpose." State v. Latraverse, R.I. , 443 A.2d 890, 893 (1982); State v. Workman, 90 Wash. 2d 443,452,584 P.2d 382 (1978);State v. Woods, 48 Ohio St. 2d 126, 132, 357 N.E.2d 1059 (1976). "The application of this standard will, of course, depend upon the nature of the intended crime and the facts

of the particular case. A substantial step...in robbery...may be quite different from that in arson, rape, or some other crime, but this standard properly directs attention to over acts of the defendant which convincingly demonstrate a firm purpose to commit a crime." State v. Latraverse, supra, 895. This standard shifts the focus from what has been done to what remains to be done. What constitutes a "substantial step" in any given case is a question of fact. State v. Workman, supra. The "substantial step" standard in §53a-49(a)(2) is illustrated in §53a-49(b) with some examples of conduct which are "not...insufficient as a matter of law" to constitute a substantial step. These examples are not

all-inclusive. On the evidence, the jury could reasonably have found that his intentional conduct constituted a substantial step under this subsection.

There is no error.

In this opinion the other judges concurred.

APPENDIX B

ORDER DENYING MOTION TO REARGUE

NO. 11147

STATE OF CONNECTICUT SUPREME COURT

VS. STATE OF CONNECTICUT

DEMETRIUS GREEN SEPTEMBER 26, 1984

O R D E R

THE MOTION OF THE DEFENDANT, FILED AUGUST 24, 1984 TO REARGUE, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT

FRANCIS J. DRUMM, JR.
CHIEF CLERK

BY _____
Asst. Clerk-
Appellate

Notice to:
JOHN R. WILLIAMS
HOWARD J. GEMEINER
ARNOLD MARKLE, S.A.
PATRICK CLIFFORD, A.S.A.
JULIA DICOCCO DEWEY, A.S.A.
CLERK, SUPERIOR COURT, NEW HAVEN
REPORTER OF JUDICIAL DECISIONS, 9-26-84